BAYER (M) SDN. BHD.

v.

ANWAR BIN ABD RAHIM

HIGH COURT MALAYA, KUALA LUMPUR
TUAN LOW HOP BING JC
[ORIGINATING MOTION NO. R3-25-56-1994]
27 APRIL 1995

INDUSTRIAL LAW: *Certiorari - Application to quash award of Industrial Court allowing the respondent's claim for constructive dismissal - Whether proper test governing constructive dismissal applied - Whether the respondent had established constructive dismissal - Whether the Industrial Court had erred in law and acted in excess of jurisdiction.*

The applicant applied for an order of *certiorari* to quash the award granted by the Industrial Court in favour of the respondent who claimed constructive dismissal.

The respondent first joined the services of the applicant company in December 1975, resigned in June 1980 and rejoined in January 1981 as a senior executive. From 1986, the respondent was the coordinator in charge of the applicant's Shah Alam Project valued at RM9 million until he left the company in October 1989. During 1988/1989, the applicant faced a serious shortage of office space due to the expansion of the diagnostic division. The board room and the chairman's office were converted for this purpose and the applicant proposed that the respondent exchange his room with the head of the diagnostic division. Thereafter, a memo dated 17 October 1989 was issued to the respondent but after a meeting with the management and at the respondent's request this proposed change was postponed to the end of October 1989. By letter dated 23 October 1989, the respondent walked away from his job on the ground of constructive dismissal. In his letter, the respondent claimed that the applicant's suggestion in its memo that the company could pay severance pay and "help" the respondent to seek another job through a placement agency indicated that the applicant wanted to drive him out of his employment. The respondent also relied on several other facts i.e. that he was relieved of his administrative function except pertaining to the Project, his secretary and clerk were transferred out in June 1989, the change of his car parking lot and the proposal for the exchange of his office.

The issues were whether the respondent had the right to leave his job and whether the Industrial Court had erred in law and acted in excess of jurisdiction when it found in favour of the respondent.

Held:

[1] In order to succeed in a claim for constructive dismissal, the employee must prove to the satisfaction of the Court that the employer is guilty of a breach which goes to the root of the contract or if the employer has evinced an intention no longer to be bound by it. Thus the test applicable in a constructive dismissal case is the "contract test" and not the "test of reasonableness."

[2] Having considered the reasons stated in the respondent's letter, it seems clear that the respondent was not entitled in law to walk away from his job. Furthermore, the reasons not stated in the letter are in fact not the reasons which immediately led to the respondent walking away from his job and they do not in any way satisfy the principles established in the Supreme Court decision in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45. Accordingly, the respondent has failed to establish constructive dismissal.

[3] The Industrial Court's finding that the conduct of the applicant was "not justifiable", "not *bona fide*" and so constitutes "embarrassment" clearly shows that it had erroneously applied the "test of reasonableness" and not the "contract test" and so had acted in excess of jurisdiction constituting an error of law.

[Order in terms of application].

Cases referred to:
Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd., [1988] 1 CLJ 45 ***(foll)***
Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 AMR 1577 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(3), 30(5) 33B(1)
Rules of the High Court 1980, O. 53 r. 1(2)

For the applicant - T.M. Varughese & Co.
For the respondent - Lobo & Associates

JUDGMENT

Low Hop Bing JC:

I. Application

This is an application by the applicant for an order of *certiorari* to quash an award made by the Industrial Court under the Industrial Relations Act 1967 ("the impugned award") on a reference to it by the Minister under s. 20(3) of the Act. For the purposes of this judgment, a reference to a section is a reference to that section of the Act, unless the context otherwise requires.

II. Applicant's Grounds of Application

In the applicant's statement filed pursuant to O. 53 r. 1(2) of the Rules of the High Court 1980, the following grounds are stated:

(a) The Industrial Court erred in law and acted without or in excess of its jurisdiction by failing to apply and/or to apply properly the established principles of industrial law on 'constructive dismissal' laid down by the Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45.

(b) The Industrial Court ought to have decided that the applicant did not commit any breach of fundamental terms of the contract of service and/or even if the applicant did commit any such breach (which is denied), by reason of the delay the respondent would be regarded as having elected to affirm the contract, which would disqualify him to claim constructive dismissal.

(c) The Industrial Court asked the wrong questions and considered irrelevant matters and applied the wrong legal tests to conclude that there was a strong and indefensible case of constructive dismissal by the applicant, whereby the Industrial Court acted without or in excess of jurisdiction.

(d) The Industrial Court made various inferences and findings unsupported by legal evidence and failed to make any material findings relevant to the cause of constructive dismissal to arrive at its conclusions.

(e) In all the circumstances of the case, the order of back wages and compensation made in the impugned award is so unreasonable and without any legal basis and in breach of s. 30(5) whereby the Industrial Court acted in excess of jurisdiction.

III. Respondent's Submission

The respondent submits that the Industrial Court had not committed any jurisdictional error when making the impugned award.

IV. Facts of this Case

The applicant is incorporated under the laws of Malaysia and is engaged in the import and distribution of chemicals, veterinary and pharmaceutical products. The respondent first joined the service of the company in December 1975 and resigned in June 1980. Subsequently, he rejoined in January 1981 as a senior executive. From about 2 May 1984, the respondent became the personnel and administration manager. Since 1986, the respondent was the coordinator in charge of the company's Shah Alam project, of a value of RM9 million. He continued to be responsible for this project until he walked away from service in October 1989.

During 1988/89, the applicant was facing serious shortage of office space due to additional staff and the bringing in of diagnostic equipment. The respondent was fully aware of this problem. The board room and the chairman's office were converted as office towards this purpose. With the expansion of the diagnostic division, the applicant proposed that the respondent exchange his room with one T.S. Chee, head of the diagnostic division. Accordingly, the applicant issued a memo dated 17 October 1989 to the respondent.

Thereafter, on 19 October, the respondent attended a meeting with the management and at the request of the respondent, the proposed change of office was postponed till the end of October 1989.

By letter dated 23 October 1989 ("the said letter"), the respondent walked away from his job as he considered himself dismissed by the applicant.

V. The Issue

The issue before the Industrial Court was: On the basis of the said letter, was the respondent right in law to walk away and claim constructive dismissal?

VI. Decision in this Application

In an application for judicial review by way of *certiorari,* I am mindful of and hereby apply the following established principles:

1. Judicial review is not concerned with the merits of the decision but the decision making process. It is trite law that Industrial Court awards are sheltered from review (and appeal) by virtue of s. 33B(1) except on ground of error of law.

2. The High Court has the power to quash the impugned award pursuant to s. 33B(1) if the Industrial Court commits an error of law or fact, *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 AMR 1577.

In my judgment, in order to succeed in a claim for constructive dismissal, the employee must prove to the satisfaction of the Court that the employer is guilty of a breach which goes to the root of the contract or if the employer has evinced an intention no longer to be bound by it. It is only in such a situation that the employee is entitled to regard the contract as terminated and treat himself as being dismissed. Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Thus, it is settled law that the test applicable in a constructive dismissal case is "the contract test" and not "the test of reasonableness". To claim constructive dismissal, four conditions must be fulfilled. These conditions are:

(1) There must be a breach of contract by the employer;

(2) The breach must be sufficiently important to justify the employee resigning;

(3) The employee must leave in response to the breach and not for any other unconnected reasons; and

(4) He must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

(See *Wong Chee Hong v. Cathay Organisation, supra*).

If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the Act. The crucial document that I must critically examine is the said letter and the reasons given therein for him to walk away from his job claiming constructive dismissal. The said letter reads:

Anwar Abd. Rahim,
No. 51, Jalan K3,
Taman Melati,
53100, Kuala Lumpur.

The Managing Director,
Bayer (M) Sdn. Bhd.,
6th Floor, Pernas International,
Jalan Sultan Ismail,
50250 Kuala Lumpur,

(Attn: Mr. K. Herzer)

23rd October, 1989.

Dear Sir,

I refer to your memo dated 17 October 1989 and the discussion with you on 19 October 1989 when I sought clarification on the contents of your memo.

In the light of what had transpired since your arrival in the company in June 1989, the contents of your memo is a clear indication that you want to drive me out of my employment for reasons best known to you. I am now convinced of this, in view of your suggestion that the company can pay me severance pay and "help" me to seek another job through a placement agency.

Under the circumstances I have no alternative but to consider myself dismissed by you with effect from today.

Yours faithfully,

Sgd: xxx

(Anwar Abd. Rahim)

Having carefully considered the reasons stated in the said letter, it seems clear to me that the respondent is not entitled in law to walk away from his job.

In the Industrial Court, the respondent relied on the following factual grounds:

i) The respondent was relieved of his administrative function, except on matters related to the Shah Alam project, after June 1989.

ii) His secretary and a clerk were transferred out in July 1989.

iii) His car parking lot was changed in July 1989 though it continued to be paid for by the applicant.

iv) The applicant issued to him a memo dated 17 October 1989 wherein it was proposed that he exchange his office room with T.S. Chee, head of diagnostic division. The proposed exchange of room was however postponed and did not take place at all.

Although the above reasons were not stated in the respondent's said letter and so do not have to be considered by me, nevertheless, I now proceed to consider these reasons. As a matter of fact, they are indeed not the reasons which directly and immediately led to the respondent walking away from his job. Further these reasons do not in any way satisfy the principles established in the Supreme Court decision in *Wong Chee Hong*. That being the case, the respondent has failed to establish constructive dismissal. The Industrial Court, in making the impugned award, has erred in law in failing to apply the proper legal test governing a case based on constructive dismissal. The Industrial Court's finding that the conduct of the applicant was "not justifiable", "not *bona fide*" and so constitutes "embarrassment" clearly shows that it had erroneously applied "the test of reasonableness" and not "the contract test", and so has acted in excess of jurisdiction constituting an error of law. In the circumstances, I grant an order in terms of this motion.